No. 92-1168

(16)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TERESA HARRIS,
Petitioner,

v.

FORKLIFT SYSTEMS, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*. The written consents of both parties have been provided herewith to the Clerk of this Court. The brief urges this Court to affirm the decision below, and thus supports the position of Respondent Forklift Systems, Inc.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment dis-

crimination. Its membership includes over 270 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its association members, are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII) as well as other equal employment statutes and regulations. As employers, EEAC's members and member constituencies have a strong interest in maintaining workplaces that are free from sexual harassment. As potential respondents to Title VII charges and other employment-related claims, EEAC's members are interested in when conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)), so as to be actionable sexual harassment under Title VII.

Pursuant to this Court's guidance in *Meritor*, EEAC's members have instituted preventative measures designed to discourage sexual harassment, which include: adoption of policies expressly forbidding supervisors and employees to engage in sexually harassing conduct; publication of employee manuals

and posting of notices to inform employees of their rights; and training supervisors to recognize and halt harassment in the workplace. In addition, many members have implemented formal anti-harassment procedures whereby an aggrieved employee can seek redress from higher management authorities, or even bring an internal complaint against a co-worker or supervisor who has engaged in harassment in the workplace. These policies call for prompt and effective remedial action by the employer, including discipline and, where appropriate, discharge of the offender.

Thus, the issue presented in the petition is extremely important to the nationwide constituency that EEAC represents. The district court concluded, and the Sixth Circuit affirmed, that while the conduct in question was offensive and sexual in nature, it did not meet the threshold of "hostile environment" sexual harassment sufficient to violate Title VII. Petitioner contends that an inaccurate standard was used, and in effect asks this Court to elaborate on the principles set forth in *Meritor*.

Because of its interest in the nation's civil rights laws, EEAC has, since its founding in 1976, filed briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC participated as *amicus curiae* in *Meritor*. In addition, EEAC has filed briefs in a number of other cases involving sexual harassment issues.[1]

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[1] *See, e.g., Chrysler Corp. v. International Union, Allied Indus. Workers of Am., AFL-CIO, cert. denied*, 113 S. Ct. 304 (1992) (petition seeking review of lower court decision upholding arbitration award reinstating an employee terminated

psychological well-being." *Id.* at A33, A34. The Magistrate noted, but did not find dispositive, the fact that petitioner's "nemesis was her supervisor and owner of the company . . . ." *Id.* at A37.

The Magistrate's Report was adopted by the district court in a one paragraph order, *id.* at A4-A5, and affirmed by the Court of Appeals in a three paragraph decision. *Id.* at A2-A3.

SUMMARY OF ARGUMENT

This case presents the Court with the difficult task of defining sexual harassment, and distinguishing unlawful behavior in the workplace from protected expression under the First Amendment. More specifically, this case requires the Court to determine when sexual harassment in the workplace can appropriately be characterized as sexual discrimination and thus prohibited under Title VII.

By its express terms, Title VII bars discrimination on the basis of sex in the "compensation, terms, conditions, or privileges of employment." The broad mandate of Title VII was designed to ensure equal employment opportunity by addressing the "entire spectrum" of discriminatory treatment that women and other minorities have encountered on the job. *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).

Discriminatory decisions with regard to hiring, firing, promotion, and salary represent one end of the "spectrum." In each such case, the impact of the discrimination is easily calculated in terms of lost dollars. Discrimination, however, can and often does take subtler forms. Thus, as this Court recognized in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), Title VII also prohibits sexual harassment that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive

working environment."

In rejecting petitioner's claim, the Sixth Circuit applied a very different rule. Under the Sixth Circuit's approach, it is not enough for a Title VII plaintiff to prove that sexual harassment interfered with her job performance. Nor is it sufficient to show the existence of a "hostile working environment" that adversely affected the plaintiff's psychological well-being. Instead, a Title VII plaintiff in the Sixth Circuit must prove both severe psychological injury *and* job impairment.

There are several problems with this formulation. First, it is inconsistent with the approach adopted by this Court and by the EEOC. In effect, the Sixth Circuit has reinstated the "tangible" injury requirement that this Court explicitly rejected as a condition for Title VII claims in *Vinson*. 477 U.S. at 64. Second, it penalizes women who are strong enough to withstand a pattern of harassment that is nonetheless inappropriate as a condition of employment under Title VII. By so doing, it merges what should be separate inquiries into liability and remedy.

In a somewhat analogous context, this Court recently held that a showing of significant physical injury is not necessary to establish an Eighth Amendment claim, although the existence of a significant physical injury is plainly relevant to damages. *Hudson v. McMillian*, 503 U.S. __, 112 S.Ct. 995 (1992). Likewise, the existence of severe psychological injury may increase the damages available to a victim of sexual harassment, but it is not essential to establishing a Title VII claim. At the very least, a victim of sexual harassment under Title VII may well be entitled to equitable relief even in the absence of the severe psychological injury now required by the Sixth Circuit.

For these reasons, we believe that the standard applied by the lower courts in this case fails to reflect con-

gressional intent and is insufficiently sensitive to the problems of discrimination that continue to plague women in the workforce. It is essential, however, that the effort to eradicate discrimination not ignore First Amendment rights or confuse nondiscrimination with political orthodoxy. We therefore disagree with the notion that "offensiveness" is the touchstone of a Title VII violation. As this Court has repeatedly held, the First Amendment often compels us to tolerate "offensive" speech as the price of a free society. *E.g., Cohen v. California*, 403 U.S. 15 (1971).

In our view, the appropriate inquiry in a sexual harassment case must begin with the challenged conduct itself.[5] If that conduct, which may involve expression, is sufficiently pervasive or intense that a reasonable person in the plaintiff's position would be significantly hindered in her job performance *or* significantly and adversely affected in her mental, emotional or physical well-being, then Title VII has been violated. The more pervasive the conduct, the less intense it must be; the more intense the conduct, the less pervasive it must be. Moreover, in assessing the impact of the challenged behavior, it is appropriate to consider the totality of the circumstances. For example, are the complaints directed against the boss or a co-worker? Do they involve pure speech or physical contact? Were the comments made in private or in front of clients? Were they part of a work-related discussion or a more general exchange of political views?

In exercising the judgment required by Title VII, the appropriate focus must be on the unique characteristics

[5] The challenged conduct in this case was plainly directed at petitioner. The question of how to analyze a claim of harassment based on untargeted speech is not presented by this record and thus not before the Court. *Cf. Robinson v. Jacksonville Shipyards, Inc.*, 760 F.2d 1486 (M.D.Fla. 1991), *argued*, No. 91-3655 (11th Cir. Dec. 2, 1992)(harassment claim based on both targeted and untargeted speech).

of the workplace. It is these characteristics -- including the existence of authority relationships that limit the opportunity of many employees to respond and the economic necessity that forces many employees to remain -- that justify the government's concern under Title VII and support its regulatory authority.

Finally, because the lower courts applied an erroneous legal standard in this case, the appropriate remedy is to remand for reconsideration of the factual record in light of the correct legal standard. *See Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982).

ARGUMENT

I. THE LOWER COURTS IN THIS CASE MISCONSTRUED TITLE VII BY HOLDING THAT A CLAIM OF SEXUAL HARASSMENT DEPENDS UPON PROOF OF BOTH JOB IMPAIRMENT AND PSYCHOLOGICAL INJURY

The notion that sexual (or racial or religious) harassment is beyond the reach of the law unless the factfinder concludes that it would have the twofold effect of impairing the "work performance" of a reasonable employee *and* severely affecting "the psychological well-being of that reasonable person under like circumstances," Pet. App. at A28-A29, is a serious impediment to equal employment opportunity and thus to the goals that animated Congress when it enacted Title VII. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

It is hardly surprising, therefore, that the legal standard applied below finds no support in the language of Title VII. It is inconsistent with this Court's decision in *Vinson*. It has been repudiated by the EEOC. And it has been not been adopted by the large majority of circuits to deal with the issue of harassment in the post-

Vinson years.

The language of Title VII, of course, does not refer to either job impairment or psychological injury. Instead, it refers to discrimination in the "terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2 (a). This broad wording was deliberately chosen. As the Court has frequently recognized, it reflects a clear congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment. *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. at 707 n.13.

The approach followed by the Sixth Circuit in this case considerably narrows the "spectrum" of discriminatory behavior that can be redressed under Title VII. By insisting upon proof of job impairment in addition to psychological injury, the Sixth Circuit has restored the requirement of "tangible" injury that this Court specifically rejected in *Vinson*. 477 U.S. at 64. Conversely, by demanding proof of psychological injury even when job impairment is shown, the Sixth Circuit has imposed a requirement on sexual harassment cases that does not exist in other areas of discrimination law. By insisting upon both job impairment and psychological injury, the Sixth Circuit has left women without any remedy if they continue to perform their jobs competently despite harassment or, alternatively, if they are affected in their job performance but not emotionally disabled.

The central holding of *Vinson* is clearly to the contrary. Quoting the relevant EEOC Guidelines, this Court declared that Title VII bars sexual harassment where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance *or* creating an intimidating, hostile, or offensive working environment." 477 U.S. at 65 (emphasis

added).[6]

While purporting to apply *Vinson*, the Sixth Circuit rule dramatically transforms its meaning. What this Court conceived as alternative theories for establishing liability under Title VII, the Sixth Circuit has merged into a single large obstacle to Title VII relief. The difference, quite obviously, is more than semantic. The shift from "or" to "and" has important substantive consequences. Recognizing those consequences, the EEOC has expressly rejected the Sixth Circuit's approach. *See* "EEOC: Policy Guidance on Sexual Harassment," 8 Fair Employment Practices Manual (BNA) 405:6681 (Mar. 19, 1990). After noting that the prevailing rule in the Sixth Circuit requires proof of psychological injury in all harassment cases, the EEOC pointedly concluded its own policy statement with the following observation: "It is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of a reasonable person." *Id.* at 6690 n.20.

This is also the view of the Ninth Circuit, which like the EEOC, has expressly disagreed with the strict test for liability imposed on Title VII plaintiffs in the Sixth Circuit. Contrasting its approach with the Sixth Circuit's, the Ninth Circuit has written: "Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation." *Ellison v. Brady*, 924

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[6] The Guidelines quoted in *Vinson* are set forth at 29 U.S.C. §1604.11 (a)(3). On various occasions, this Court has described the Guidelines as "constitut[ing] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Vinson*, 477 U.S. at 65; *General Electric v. Gilbert*, 429 U.S. 125, 141-42 (1976).

F.2d 872, 878 (9th Cir. 1991).[7]

Other circuits have been less explicit, but by continuing to rely on the language of *Vinson* they have at least implicitly rejected the more stringent test adopted by the Sixth Circuit and applied below. *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987).[8]

The emphasis on psychological injury incorporated by the Sixth Circuit into its analysis of every harassment claim under Title VII rests, in our view, on a critical failure to distinguish between liability and remedy. The existence of psychological injury is certainly relevant to any assessment of damages for harassment under Title VII. And, in the absence of job impairment, the fact that harassment was serious enough to affect the physical, emotional, or mental well-being of a reasonable person in the plaintiff's position ought to be sufficient to state a claim. *See* Point II, *supra*. But, contrary to the view of the Sixth Circuit, the absence of psychological injury cannot and should not negate a claim of sexual harassment if the record demonstrates that the job performance of a

[7] It is certainly true, as the Supreme Court noted in *Vinson*, that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." 477 U.S. at 66, *quoting Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). However, as the Ninth Circuit aptly pointed out in *Ellison*, neither *Vinson* nor *Rogers* "hold[s] that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed." 924 F.2d at 878 n.8.

[8] By contrast, the Seventh Circuit appears to share the Sixth Circuit's view that psychological injury is an indispensable element of any harassment claim under Title VII. *See Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986).

reasonable person in like circumstances would have been significantly impaired. *Id.*

Indeed, to the extent that the Sixth Circuit rule rests on the unspoken assumption that the "reasonable" response to workplace harassment is anxiety and debilitation rather than anger and resentment, it suffers from its own discriminatory biases about the status of victims in our society. At the very least, a plaintiff who demonstrates harassment under Title VII is entitled to equitable relief regardless of whether or not damages are appropriate on a particular record.[9]

Last Term, this Court considered and rejected an analogous argument in *Hudson v. McMillian*, 112 S.Ct. 995. Specifically, the Court held that a claim of excessive force under the Eighth Amendment does not require a showing in every case that the victim of the excessive force has also suffered a "significant injury." Instead, the Court ruled, the critical question under the Eighth Amendment is whether the state has engaged in the "unnecessary and wanton infliction of pain." *Id.* at 998, *quoting Whitley v. Albers*, 475 U.S. 312, 319 (1986).

Of course, this is not to say that the issue of injury is irrelevant in Eighth Amendment cases. As the Court recognized, "the extent of injury . . . is one factor that may suggest" whether the use of force was, as alleged, unnecessary and wanton. *Hudson*, 112 S.Ct. at 999. In addition, an Eighth Amendment plaintiff who is able to show significant injury obviously has a stronger claim for damages once a constitutional violation is established. "The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it." *Id.* at 999.

Similarly, the absence of psychological injury may be

[9] In that regard, it is worth noting that the petitioner in this case sought injunctive relief as well as damages. Pet.App. at A2.

relevant in sexual harassment cases but, contrary to the view of the Sixth Circuit, it is not dispositive. Just as it is possible to catalogue a list of sadly common tortures that do not inflict significant physical injury, *id.* at 1002-03 (Blackmun, J. concurring), it is surely possible to contemplate forms of harassment that should be unacceptable as a condition of employment whether or not they cause serious psychological injury.

The most plausible explanation for the psychological injury requirement imposed by the Sixth Circuit is that it is an attempt to distinguish between trivial and substantial claims of harassment. Nevertheless, the standard chosen by the Sixth Circuit remains inappropriate. Precisely the same justification was offered for the significant injury test proposed in *Hudson*. This Court, however, properly concluded that a physical injury test was unnecessary to assure that "every malevolent touch by a prison guard" does not give rise to an Eighth Amendment claim. *Id.* at 1000.

Likewise, a psychological injury requirement is unnecessary to assure that every off-color joke or sexual remark in the workplace does not result in a Title VII lawsuit. *See, e.g., Rogers v. EEOC*, 454 F.2d at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment sufficiently to violate Title VII), *cited in Vinson*, 477 U.S. at 67. Even more fundamentally, the fear of frivolous litigation cannot support a standard that has the simultaneous effect of screening out meritorious claims.[10]

One helpful way to think about the problem of

[10] In any event, the floodgate argument does not appear to be supported by the reported cases. Even in those circuits that have not embraced the Sixth Circuit's more stringent standard, there is very little evidence that women (or other minorities) are running to court to file frivolous harassment claims based on casual or isolated remarks.

harassment, and the corresponding flaws in the Sixth Circuit's approach, is to consider the case of a black employee who discovers a figure hanging in effigy from her desk lamp each day when she reports to work.[11] Surely, that employee has suffered harassment under any reasonable definition of the term. Yet, that employee would not be entitled to relief under the Sixth Circuit's interpretation of Title VII as long as she continued to perform her job competently. And, even if her job performance were affected, she would still not meet the Sixth Circuit's test unless she also demonstrated a severe adverse impact on her psychological well-being (that may or may not embrace a fully understandable anger at her mistreatment). This Court should not endorse a result so plainly at odds with the overriding purpose of Title VII, which was designed to promote equal employment opportunity without regard to race, color, religion, sex, or national origin. *See, e.g., Connecticut v. Teal*, 457 U.S. at 448; *Griggs v. Duke Power Co.*, 401 U.S. at 429-30.

II. AN APPROPRIATE HARASSMENT STANDARD MUST TAKE INTO ACCOUNT BOTH THE REALITIES OF THE WORKPLACE AND THE BREATHING SPACE REQUIRED BY THE FIRST AMENDMENT FOR EVEN OFFENSIVE SPEECH

As a shorthand statement of the principle that sexual harassment in the workplace can be actionable under Title VII, this Court's reference in *Vinson* to "an intimidating, hostile, or offensive working environment" served its intended purpose. 477 U.S. at 65. As a governing legal rule for resolving actual disputes, it has led to confusion in the lower courts that can and should be resolved.

[11] Unfortunately, these facts are not hypothetical. *See, e.g., Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1266 (7th Cir. 1991); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1506 (11th Cir. 1989).

Some courts, like the Sixth Circuit, have interpreted *Vinson* as requiring proof of job impairment and psychological injury in every case. Our disagreement with that approach has already been noted. Others have read the language of *Vinson* as permitting recovery whenever a reasonable person would be offended by the challenged expression or behavior. *See* Pet.Cert. at i. In our view, that approach is also misguided, albeit in the opposite direction.

At the outset, it is clear but worth restating that the rules developed by Congress and this Court for defining sexual harassment must meet First Amendment standards insofar as speech is involved, even when the sexual harassment dispute arises between private parties. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (enforcement of common law rules defining libel create state action for First Amendment purposes). It is equally clear as a matter of First Amendment law that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

Accordingly, this Court has long regarded it as "firmly settled" that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). To the contrary, as this Court has frequently noted,

> [a] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949). *See also Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971).

Applying that principle in *Texas v. Johnson*, 491 U.S. 397 (1989), this Court struck down a state law that made it a crime to burn the American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his actions." In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), a unanimous Court held, in an opinion by Chief Justice Rehnquist, that a public figure could not recover damages for the intentional infliction of emotional distress based on the "outrageousness" of a published parody. And, in *Forsyth County v. Nationalist Movement*, 505 U.S. __, 112 S.Ct. 2395 (1992), this Court reaffirmed its longstanding view that First Amendment rights should not be diminished by a heckler's veto, which had been incorporated in that case into the local standards for issuing a parade permit.

In short, a legal rule that turns on the offensiveness of speech -- whether judged objectively or subjectively -- is fraught with First Amendment dangers. Among other things, it sweeps far too broadly. *See NAACP v. Button*, 371 U.S. 415, 433 (1963)(First Amendment requires "breathing space" to survive). In the Title VII context specifically, there are innumerable comments made in offices around the country that undoubtedly give offense, sometimes intentionally and sometimes not. Without more, that cannot be enough to override our national commitment to a robust exchange of ideas, *see New York Times v. Sullivan*, 376 U.S. at 270, even in the workplace.

On the other hand, the First Amendment does not bar the government from regulating behavior that significantly impairs the equal employment opportunities of women and other minorities simply because speech is also involved. *See Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973)(upholding the use of a local antidiscrimination law to prohibit the publication of sex-segregated employment ads).

As this Court has noted in other contexts, the realities of the workplace have an inevitable impact on First

Amendment doctrine. Thus, at the same time that this Court recognized the First Amendment rights of public employees, it also recognized the state's interest as an employer in ensuring the effective functioning of its offices. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Acting as sovereign rather than employer, the government has at least an equivalent interest in ensuring that the work of private employees is not disrupted by sexual harassment, even if that disruption is occasioned by speech.[12]

In addition, it is for all practical purposes impossible for a victim of sexual harassment in the workplace simply to walk away or shut her eyes. She is in a very different position, therefore, than someone walking through a courthouse lobby who is confronted by a controversial political message, *see Cohen v. California*, 403 U.S. at 21, or someone who would rather not receive a political insert with her utility bill, *see Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 542 (1980). To be sure, she can quit her job, but the Constitution should not compel that Hobson's choice by depriving Congress of the ability to craft an alternative legal remedy.

Finally, the existence of hierarchical relationships within the workplace often makes it extraordinarily difficult for the victim of harassment to respond in any meaningful way, if at all. That problem is compounded, moreover, by the fact that harassment is rarely designed to elicit a response or, more to the point, to precipitate

[12] In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court similarly held the First Amendment rights of public school students must be measured against the state's interest in avoiding disruption within the school. Significantly, however, the Court also held in *Tinker* that the regulation of speech must be justified by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. In Title VII cases, as well, specific factual findings are required to sustain a harassment claim. *See* pp.18-19, *infra*.

a dialogue. When Justice Brandeis wrote that the remedy for speech "is more speech, not enforced silence," *Whitney v. California*, 274 U.S. 357, 377 (1977)(Brandeis, J., concurring), he was attempting to limit the government's ability to censor its critics. The operating assumptions are very different in the workplace where many employees have little choice but "enforced silence" when they are harassed on the job by their own boss, or by co-workers with the tacit or direct approval of the boss.

In construing Title VII, this Court's definition of harassment must take into account both the realities of the workplace and the demands of the First Amendment. The Constitution does not protect the right to discriminate. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 176 (1976). But when discrimination is accomplished through speech, the dividing line between what is lawful and unlawful must be drawn with sensitivity to the First Amendment values at stake. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984)(fraternal organization's policy of admitting virtually all men undermines associational claim to exclude all women).[13] In addition, the line between protected and unprotected conduct must be sufficiently clear so that it can reasonably be understood by those in the workplace who are most directly affected, as well as by those who must ultimately judge whether a violation of Title VII has occurred. *Cf. Smith v. Goguen*, 415 U.S. 566, 573 (1974).

As the welter of lower court decisions since *Vinson* has demonstrated, the concept of a hostile working environment lacks the clarity that the Constitution requires in this context. Accordingly, this Court should now make explicit what we believe was implicit in *Vinson* --

[13] *Roberts* also holds that the elimination of discrimination in the economic marketplace represents a compelling governmental interest. 468 U.S. at 628.

that sexual harassment *is* sexual discrimination when it involves conduct, including expressive conduct, that is both gender-related and sufficiently pervasive or intense that it would either (a) significantly hinder a reasonable employee from doing her job *or* (b) significantly affect a reasonable employee's mental, emotional or physical well-being.

This formulation is broader than the Sixth Circuit's, narrower than an offensiveness test, and more specific than the reference to a hostile working environment. By requiring a showing of pervasiveness or intensity, it weeds out trivial claims while recognizing that some forms of harassment are so severe that they should be actionable even if they are relatively isolated.[14] By using the term "gender-related," it makes clear that harassment can occur even in the absence of sexually explicit remarks.[15] By relying on a reasonable employee standard, it eliminates the problem of the unduly thin-skinned plaintiff. By providing a remedy for women who are significantly hindered in their job performance by work-

[14] The EEOC has also recognized that pervasiveness and intensity may be inversely related as preconditions for a harassment claim. *See* "EEOC Policy Guidance," *supra* at 405-6690 ("a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents"). *See also Ellison v. Brady*, 924 F.2d at 878.

[15] For example, repeated and demeaning comments about a female employee's ability to perform her job assignment because she is a woman may constitute harassment in appropriate circumstances even in the absence of any sexual references or overtures. Once again, this view is in accord with the EEOC's current thinking. *See* "EEOC Policy Guidance," *supra* at 405-6692. *See also Andrews v. Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Hicks v. Gates Rubber Co.*, 833 F.2d at 1415.

place harassment, it most directly reflects the language of Title VII, which bars discrimination in the terms, conditions, or privileges of employment." By authorizing relief upon the alternative showing that the mental, emotional, or physical well-being of a reasonable employee would be significantly affected by the harassment that the plaintiff was forced to endure, it does not penalize the worker who continues to perform her job competently while suffering in other ways outside the office. For all of these reasons, the formulation we propose is most faithful in our view to the dual goals of promoting equal employment opportunity and preserving the safeguards of the First Amendment.

Because the courts below applied an erroneous legal standard in this case (even if this Court does nothing more than reaffirm its prior holding in *Vinson*), and because the Magistrate's factual findings were so interwoven with his mistaken legal analysis, the case should be remanded for reconsideration of the record under the appropriate legal standard, as this Court did in *Vinson* under similar circumstances. 477 U.S. at 67-68. *See also Pullman-Standard v. Swint*, 456 U.S. at 293.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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Dated: April 30, 1993